SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1965

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No. 1041

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

SARA E. PENN, HELENA L. LEVINE, BARBARA PLISKOW, EDWARD M. PITT, BENITA T. CANNON, CLAUDIO RAMOS, THOMAS MCKENNA, MERYL CHATKIN, ISIDORE T. BLOOM, DAVID RIVERA, and SAUL GOTTLIEB,
Petitioners.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Opinions Below

The decision of the New York Court of Appeals, affirming the judgment without opinion, is reported at 16 N. Y. 2d 581. The opinion of the Appellate Term of the New York Supreme Court is reported at 48 Misc. 2d 634.

The Statute Involved

The relevant portions of Section 722 of the Penal Law provide:

> "Disorderly Conduct.
>
> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> * * *
>
> "2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others.
>
> "3. Congregates with others on a public street and refuses to move on when ordered by the police;"

Questions Presented

Whether the First and Fourteenth Amendments of the Constitution of the United States shield from prosecution illegal acts, committed for the purpose of protesting illegal racial discrimination in the building trades.

Whether the United States Constitution prohibits the exclusion from evidence of testimony relating to specific details of discrimination committed by the organization against which the protest was directed.

Statement

The People's Case

The Incident at 10:00 A.M.

Salvatore Kane, a truck driver for the Transit Mix Corporation, testified that on August 1, 1963, he was on route to deliver cement to the S. S. Silverblatt Housing Project located off Rutgers Street in Manhattan (8-10).*

Steering his 35 foot truck left from Rutgers Street onto an access road, he approached the entrance gate of the project at a speed of 15 miles per hour. Two men stationed at the gate "waved on to come in" (197-8) when suddenly a group of people "jumped right in front of me" and sat down before the gate, forcing the driver to make a "quick stop" (10-11, 18, 199). The driver identified those who blocked his way as the petitioners Pitt, Penn, Pliskow and Levine (10-13; also see Exh. 1). The defendants didn't use loud or boisterous language, but were singing. The witness also noticed others picketing with signs near the construction site (23). The driver was told to stay in his truck (32), and he remained there for fifteen or twenty minutes until the obstruction was cleared away (15).

Thomas Coyne, a police sergeant attached to the 7th Precinct was on duty on August 1, 1963 at the Rutgers Street entrance to the construction site, arriving at about 6:00 a.m. that morning (50-1). At about 10:00 a.m. the site was being picketed by about 150 people (52, 70-1). At

* References, unless otherwise indicated, are to the typewritten minutes of trial.

that time, a cement truck approached the gate, and "a cry went up from the pickets area, stop the truck" (51).

> "The next thing I observed was four pickets from the original picketing group go under the police barrier and proceed to sit in the roadway at the entrance to the construction site * * * The truck which was proceeding through the entrance then came to a stop" (52).

The pickets who blocked the roadway were identified as the petitioners Pitt, Penn, Pliskow and Levine (53; also see Exh. 1).

The sergeant talked to an inspector who talked to each defendant individually, receiving no reply (54-5). Then Coyne told each picket that they were violating the law, and asked each to "get up and leave, they were blocking the lawful delivery of concrete to the construction site" (53, 61-4). Three other officers also spoke with the petitioners, but "they all refused to get up and leave" (53, 59). Finally, after being seated in the roadway for about fifteen minutes, the defendants were arrested and walked quietly to the police wagon (56, 66).

During the incident, the number of pedestrians congregating about the scene increased from approximately 100 to 200 (71), reporters, photographers, and a large detail of police also being present (56, 64-5, 71, 74). The vehicles passing on Rutgers Street were slowing down to observe, and a policeman had to be dispatched to expedite the traffic (57).

The Incident at 11:00 A.M.

Paul Orlando, a truck driver, testified that at 11:00 a.m. on August 1, 1963, he was in the vicinity of Rutgers Street delivering concrete to the project site (37-8). As he neared the entrance, several pickets jumped in front of the truck and sat in the roadway, forcing him to halt his truck on an incline (38-9, 42, 46). The witness identified two of the pickets as the defendants Cannon and Rivera (39; also see Exh. 2). Setting the truck's foot brake, hand brake, and trolley brake, Orlando left the cab and gave the police his license (40). He noticed other pickets in the area with signs, as well as photographers and reporters (45). After about a half hour delay, the roadway was cleared and the driver was able to steer his truck onto the construction site (40, 45). On cross-examination, the witness added that he had been to the site earlier at 7:30 a.m., but the pickets were then at the back gate (46).

Salvatore Kane testified that at about 11:00 a.m. he returned to the site with another load of cement (15).

> "I spotted a truck being blocked by pedestrians, so I had no choice, going around him or backing up, so I pulled behind him and then these people got underneath my truck" (16).

Kane recognized the defendant Chatkin as the picket who slid under his truck and sat in front of the left rear wheel (16, 26-9, 201). Since his vehicle was stopped on an upwards incline, the driver remained in the cab with his foot on the brake all the time (35), another truck having arrived and stopped behind him (25-6).

Harold McCauley, a sergeant attached to the 17th Precinct was stationed at the Rutgers Housing site since 6:00 a.m. on August 1. He stated that trucks turning left on Rutgers Street would drive along the access road towards the entrance gate (113, 120, 122) which, although kept closed, would be opened by two men upon the approach of a vehicle (86-7, 111). At about 11:00 a.m. there were 100 to 125 pickets in the area (115), as a truck approached the gate.

> "A number of pickets who were inside the police lines, police barriers, there was a cry from I don't know where, here comes a truck, and at that time a number of pickets overran the police barriers by going under them, and through them, and jumping over the barriers, and into the roadway, and threw themselves in the roadway, sat down, and the truck came to a stop" (87).

The defendant Cannon sat directly in front of the right front wheel of the concrete truck, with the defendant Ramos next to her. Behind them, but in front of the gate, sat the defendants McKenna, Gottlieb and Rivera (88, 90; also see Exh. 2).

Several minutes later, a second cement truck arrived and stopped behind the first one. Two pickets, the defendants Bloom and Chatkin, then sat down in front of its wheels (92-3).

The sergeant with Deputy Inspector Lewis approached each defendant and spoke to them (93). Lewis first addressed the three seated in front of the gate, McKenna, Gottlieb and Rivera. He asked them to get up and walk away, but received no reply (94). Telling them that they

must move, as they were obstructing the roadway and violating the law, he again received no response (95). McCauley told the same three they would have to move, but could resume picketing, again being faced with silence (95). The three were then arrested and walked quietly to the patrol wagon (96).

Lewis and McCauley then confronted Cannon and Ramos, seated directly in front of the first truck. Lewis asked them to "please get up from the roadway, and walk away or resume your picketing, that you are obstructing traffic" (96). McCauley reiterated the request and warned the pickets that they were subject to arrest. Receiving no response, the two defendants were arrested (96-7).

The two officers then addressed Bloom and Chatkin who were blocking the second truck, Bloom being seated in front of the right rear wheel (97). Both policemen asked the defendants to move on.

> "He [Bloom] stated to me [McCauley], if I arrest him he will get up" (98).

The defendants were then arrested (98).

During these events, the original crowd of about 100 to 125 pedestrians grew to about 175 to 225 in number, and gathered about the sidewalk and roadway looking on (98-9, 115). Vehicular traffic of about medium density was routed around the trucks by other policemen (99-100).

The Defense

Madison Jones, executive director of the City Commission of Human Rights (142), **Donald Shaughnessy,** a professor at Columbia University and a member of the

faculty of the Institute of Labor Management Relations at Rutgers University (164-5), and **Shirley Siegal**, an assistant attorney general in charge of the Civil Rights Bureau (168-9), each testified that they were familiar with allegations of discrimination in the building construction industry and with results of investigations into the charges (Jones 142-3, 147; Shaughnessy 165; Siegal 170-1). However, tesimony "with reference to any findings that they may have made as a result of studies" was not admitted into evidence by the court (209).

Harold Klorfine, a secretary of the New York City Housing Authority, a public corporation in charge of the Rutgers Housing site (153), testified that the project was bounded by Pike Street on the west, Rutgers Street on the east, Madison Street on the north, and Cherry Street on the south (156). An access road, formerly known as Monroe Street, runs through the project grounds connecting Rutgers and Pike Streets, each approachway having its own entrance gate. The boundary line appears to extend about two feet in front of the Rutgers Street gate to the project (157-60). The witness added that among the unions represented in the construction of the housing project were bricklayers, masons, lathers, carpenters, steamfitters, electricians, plumbers and sheet metal mechanics (162-4).

Helena Louis Levine, an instructor at New York University and doctoral candidate, testified in her own defense (172-3).

She related that after hearing about the picketing through various organizations and individuals, she de-

cided to join the protest at the housing project (178). Early in the morning of August 1, she had sat in front of the Pike Street entrance to the project for about 10 or 15 minutes, but the police rerouted trucks and didn't arrest her (188-9). A while later the pickets decided to block both entrances to the project, one half of them picketing each gate (189). At about 10:00 a.m., "somebody said, here comes a truck" (181), and as "part of a plan" (180), the "logical point" arrived to continue the protest by "prevent(ing) the truck from entering" (181-2). The witness, however, explained that the "plan" did not specify who would block the truck, but that "those who wished to continue their protest could do so * * * when the truck came" (179-82).

The defendant then sat in front of the truck, and although asked twice by two policemen to "move on," she didn't answer and didn't move (184-5).

The witness stated the reason for the protest:

> "I intended to bring it to the attention of the authorities there was discrimination being practiced in the building trades unions, which was against the law, in violation of the law" (175).

It was stipulated by the parties that if the other defendants were to testify "they would testify that on August 1, 1963, they sat down at the places approximately testified to by People's witnesses for the purposes and with the intent stated by Mrs. Levine, to be her purpose and intent" (192-6).

The Judgment

On October 2, 1963, judgment was entered in the Criminal Court of the City of New York, County of New York, convicting the petitioners of the offense of Disorderly Conduct (Penal Law, §722, subdivisions 2 and 3), and sentencing each defendant to pay a fine of $25.00 or, in default thereof, to serve five days in jail (Mins. of Sent. 7). On October 15, 1964, the Appellate Term of the Supreme Court, First Department, affirmed the conviction, one Justice dissenting, and subsequently, the case was affirmed unanimously by the New York Court of Appeals.

Summary of Argument

The instant appeal arises from one of a growing number of incidents of disorder connected with racial protest. The present case concerns the deliberate interference with trucks delivering construction supplies to the Rutgers Housing site. Separated by an interval of one hour, the petitioners in two groups darted into the path of trucks and sat immobile in front of the wheels. Ingoring the pleas of police to move out of the way and return to the picket line, the petitioners effectively obstructed the vehicles, until police were compelled to arrest them. Clearly, this behavior constituted the offense of disorderly conduct.

Nonetheless, the petitioners here contend they were guiltless, first, because their actions were designed to call attention to criminal racial policies of the construction unions, and second, because it was constitutionally protected "free speech." They are mistaken on both scores.

Regardless of how laudable and public-spirited their purposes, the defendants' conduct was inappropriate and unnecessary to these ends. A similar disproportion mars their constitutional argument. The petition for redress may not be exercised in a manner unnecessarily disruptive to *public order.*

POINT I

Section 722 of the New York Penal Law as applied does not infringe upon the rights of petitioners under the First and Fourteenth Amendments of the United States Constitution.

Not content with protesting alleged racial discrimination in the building trades unions by peaceful picketing, the defendants, part of a group of about 150 demonstrators, deliberately overran police boundary markers for the manifest purpose of obstruction and disturbance of the public peace. Having failed to halt the entrance of trucks into a construction project, known as the Rutgers Housing site, by blocking one of the two gates, the pickets redeployed to cover both entrances to the grounds. At 10:00 a.m. the arrival of a huge cement truck presented "obviously the logical point" to impede the progress of construction. "A cry went up from the pickets, stop the truck" (51), and four defendants, breaking ranks, jumped into the roadway and sat down, abruptly halting the driver who obviously could not roll his huge van over immobile human beings. After 10 or 15 minutes of fruitlessly imploring each defendant to move, their entreaties and explanations of the law being met by silence, the police

arrested the defendants. At 11:00 a.m., apparently undeterred by earlier events, seven other demonstrators by the same method succeeded in blocking the entrance to the site of two more cement delivery trucks, this time for about half an hour. Similar police pleas to resume picketing on the sidewalk, were tersely answered by a defendant, indicating that he would "get up" if arrested. During both these incidents, the crowd of onlookers appreciably increased in size, the access road was completely clogged, no delivery trucks being able to enter the gate, and traffic on Rutgers Street was slowed, a policeman being sent to expedite its flow.

Thus, by their actions, the defendants have produced a virtually classic case of disorderly conduct. The demonstrators not only effectively obstructed and interfered with others (the truck drivers), but congregated on a public street and refused to move on when ordered to do so by police. Moreover, their dramatic action and conflict with police and truckers threatened a more serious breach of the peace.

This Court has held public expression of social grievances within the constitutional protection of the First Amendment. However, it is equally clear that protest by demonstration does not stand on the same constitutional footing as verbal expression.

> "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure

> speech * * * We reaffirm the statement of the Court in Giboney v. Empire Storage & Ice Co., supra, 336 U. S. at 502, that 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.' " [*Cox* v. *Louisiana*, 379 U. S. 559 (1965)].

Accordingly, protest which takes the form of conduct is subject to reasonable regulation and control in the interest of public safety and order [see *Martin* v. *Struthers*, 319 U. S. 141, 143, 147 (1943); *Whitney* v. *California*, 274 U. S. 357, 373 (1927) (concurring opinion)].

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection." [*Cox* v. *New Hampshire*, 312 U. S. 569, 574 (1940); also see, *Lovell* v. *Griffin*, 303 U. S. 444, 451 (1937); *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515-16 (1938); *Schneider* v. *State*, 308 U. S. 147, 160 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296, 306-7 (1940); *Giboney* v.

Empire Storage & Ice Co., 336 U. S. 490 (1949); *Poulos* v. *New Hampshire*, 345 U. S. 395 (1953); *People* v. *Peck*, 7 N. Y. 2d 76 (1959); *People* v. *Ward*, 159 Misc. 328 (App. Pt. 2d Dept. 1936), aff'd 272 N. Y. 615 (1936); *People* v. *Stover*, 12 N. Y. 2d 462 (1963); *People* v. *Martin*, 43 Misc. 2d 355 (App. Term, 2d Dept. 1964), aff'd 15 N. Y. 2d 933 (1965), cert. den. 382 U. S. 828 (1965)].

While the petitioners apparently do not question the right of the state reasonably to restrict the exercise of speech, they maintain that their instant actions, designed to call the attention of the authorities to a violation of the law, i.e., discrimination practiced by the building trades unions, are thereby constitutionally protected. However, the element overlooked by this argument is that, although the motives of the pickets may have been commendable, the means chosen to dramatize their protest were neither meritorious nor peaceful.

Indeed, there is not even a reasonable relationship between the means adopted and the intent to procure rapid remedial measures for their grievances. No amount of sitting-down could here result in an immediate end to segregation practices in the unions, or to the immediate arrests of violators. Besides, if the demonstration was intended to call official attention to a violation of the law, then the mission of the picketers was accomplished when the police initially observed them lawfully picketing. Unlawful behavior is surely unnecessary to attract a police officer's attention. Moreover, the demonstrators elected to sit, not until the police became aware of their claim, but until they were arrested. If getting arrested, with its

attendant publicity, was what they intended, then the defendants pose another paradox: seeking arrest and by the same token deeming the arrest unlawful. This logical absurdity additionally suggests the falsity of petitioners' thesis.

Indeed, the unreasonableness of the sit-down method is clear from the evidence of free opportunity to peacefully bring their protest to the attention of the authorities. They had been picketing the construction site for many days, including the day in question, and were permitted to display their signs and sing their songs without interference. It was only when the pickets chose to dramatize the protest by interfering with the rights of others that they invoked the censure of the law. Even after the petitioners had first sat down, they were still offered the opportunity to rejoin the pickets behind the police barriers (95-6), if they only got up from the roadway. The police thus in no way attempted unreasonably to curtail the airing of anti-segregation sentiment, objecting only to the disruptive manner of the protest. Evidently, then, the real purpose of the sit-downs was not simply to call attention to discrimination, for this was accomplished by picketing within the police barriers, but, by bold interference with trucks on a city street and defiant courting of their own arrest, to obtain the publicity which invariably accompanies acts of public disruption. Such a posture does not commend itself to constitutional protection.

> "A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did

not agree to listen to their exhortations." [*Cox* v. *Louisiana*, 379 U. S. 559 (1965).]

* * *

"One would not be justified in ignoring the familiar red light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions" [*Cox* v. *New Hampshire*, 312 U. S. 569, 574 (1940)].

* * *

"[A] person could not exercise this liberty [freedom of speech] by taking his stand in the middle of a crowded street, contrary to traffic regulations and maintain his position to the stoppage of all traffic * * *" [*Schneider* v. *State*, 308 U. S. 147, 160 (1939)].

Furthermore, the attempt to introduce testimony and investigative reports substantiating charges of discrimination in the building trades unions was properly defeated by the trial court. For, if the defendants sought to establish a reasonable and good faith foundation for their allegations, it was sufficient to allow the defense witnesses to testify that they were familiar with the charges, as well as with reports of investigations into those charges. Indeed, discrimination in building trades unions was "of so long duration and so widely known that the courts might, if they so elected, take judicial notice of the fact" [*Gaynor* v. *Rockefeller*, 21 App. Div. 2d 92, 100 (1st Dept. 1964)]. Thus establishing that the protest was not speciously and maliciously grounded, proof of its truth was irrelevant to a defense of "fair comment" [see, *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279-83 (1964)].

Finally, while the petition repeatedly attacks the New York authorities for "making no effort" to enforce anti-discrimination measures, the police and district attorney, according to the petition, preferring to enforce the disorderly conduct laws instead, it should be noticed that at least in New York County members of the building trades unions have been prosecuted for practicing segregation [see *People* v. *McLinskey,* Ind. No. 4456/1964, ruled incompetent to stand trial, April 20, 1965; *People* v. *Schurkman,* Ind. No. 4457/1964, convicted, April 28, 1965].

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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